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dba TRUSTEE CORPS

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

MALCOLM AND SUZY HUNT.

**Plaintiff,**

VS.

MTC FINANCIAL, INC. DBA  
TRUSTEE CORPS, JPMORGAN  
CHASE BANK, N.A.

## Defendants.

Case No. 3:14-cv-00359-MMD-WGC

**DEFENDANT MTC FINANCIAL INC. dba  
TRUSTEE CORPS' MOTION TO DISMISS  
WITH PREJUDICE THE PLAINTIFF'S  
COMPLAINT; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Defendant MTC FINANCIAL INC. dba TRUSTEE CORPS (“TRUSTEE CORPS”), by and through its counsel of record, moves the Court to Dismiss the Complaint including the First, Second, Third, and Fourth Causes of Action of Plaintiffs MALCOLM HUNT AND SUZY HUNT (collectively, “Plaintiffs”) *with prejudice* for failure to state a claim upon which relief may be granted. This Motion is made and based upon Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This Motion is based upon the Memorandum of Points and Authorities submitted herewith, and upon all pleadings, papers and documents on file herein, together with those matters of which judicial notice has been requested, and any oral argument which may be presented at the time of the hearing.

Dated: July 16, 2014

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

This is case where not a single liability count or even theory is properly pleaded against or addressed to TRUSTEE CORPS. Rather, Plaintiffs plead against JPMORGAN CHASE BANK, NATIONAL ASSOCIATION (“Chase”) or against “defendants” as a “catch all” in trying to assert a cause of action against TRUSTEE CORPS.

Plaintiffs' case arises from claims connected with the start of the foreclosure process and in particular the singular event of recording and serving a notice of default. *Plaintiffs have been in default since June 1, 2010.*

Plaintiffs' action as to TRUSTEE CORPS is defective. In their pleading, Plaintiffs assert a "wrongful foreclosure" claims when no foreclosure has taken place, and the claim is obviously premature. In that count, Plaintiffs claim a violation in not posting the NOD, but nothing is pleaded to show any prejudice therefrom. Plaintiffs also assert claims under Nevada's new Homeowner's Bill of Rights ("HBOR") (N.R.S. 107.400- 107.560). But, Plaintiffs have asserted factually no material violations of HBOR by TRUSTEE CORPS, and their claims for damages under HBOR should be dismissed as not allowed under the applicable provision of HBOR. Finally, Plaintiffs plead in conclusory fashion fraud asserting statements in the Affidavit of Authority attached to the NOD are false but failing to put forth facts to show why the statements are false and failing to put forth facts to show TRUSTEE CORPS' knowing participation in the fraud. Accordingly, the entire complaint should be dismissed without leave to amend as to TRUSTEE CORPS.

## II. STATEMENT OF FACTS

By way of documents for which the Court can take judicial notice, the following has transpired with respect to this non-judicial foreclosure.

A Deed of Trust (“DOT”) was recorded on June 21, 2006 in the Storey County Recorder’s Office attached to the Request for Judicial Notice (“RJN”) as Exhibit 1. The DOT identifies the borrowers as Suzy Hunt and Malcolm Hunt, the lender and beneficiary as Washington Mutual Bank, FA (“WAMU”), and the trustee as California Reconveyance Company (“CalRecon”). The

1 note is secured by the DOT in the amount \$353,500. The referenced real property secured in the  
 2 DOT is 42 North A Street, Virginia City, NV 89440 (the “Property”).

3 In 2008, the Office of Thrift Supervision (“OTS”) took over WAMU with the FDIC acting  
 4 as receiver. The FDIC subsequently sold the loan assets to Chase. A string of cases in the U.S.  
 5 District Courts of Nevada explain this occurrence.

6 “On September 25, 2008, the Office of Thrift Supervision closed Washington  
 7 Mutual Bank and the FDIC was appointed as receiver, succeeding to “all rights,  
 8 titles, powers and privileges of” the failed institution, with the authority to “take  
 9 over the assets of and operate” the failed institution with all of the powers thereof  
 pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of  
 1989 (“FIRREA”), specifically 12 U.S.C. §§ 1821(d)(2)(A)(I), 1821(d)(2)(B)(I).”  
Seiler v. JPMorgan Chase Bank, N.A., 2012 WL 194428 \*4 (D.Nev.)

10 “WaMu, … failed during the financial upheaval that occurred in 2008 and was  
 11 taken over by the United States Office of Thrift Supervision, which appointed the  
 12 Federal Deposit Insurance Corporation (“FDIC”) as receiver. The FDIC sold  
 13 WaMu and its assets to Chase pursuant to a Purchase and Assumption Agreement  
 (“P & A Agreement”). Tubin v. Washington Mut. Sav. Bank, 2011 WL 5834302  
 \*1 (D.Nev.)

14 As to considering the effect of the P& A Agreement, Chase’s purchase of WAMU’s assets  
 15 (loans and loan servicing rights), and Chase becoming WAMU’s successor interest, the U.S.  
 16 District Court in Tubin v. Washington Mut. Sav. Bank, 2011 WL 5834302 \*1, fn. 1 stated:

17 “The Court [may] take judicial notice of these commonly known, verifiable facts  
 18 and public documents, though Plaintiff does generally allege that J.P. Morgan  
 19 Chase acquired WaMu and is WaMu’s successor in interest.” Id.

20 While Co-Defendant Chase will submit the P& A Agreement and other documents to  
 21 show the FDIC sold WAMU’s loan assets, which encompass this loan, to Chase, and Chase  
 22 thereby became successor in interest to WAMU, TRUSTEE CORPS also requests the Court take  
 23 judicial notice of the WAMU sale at, “<http://www.fdic.gov/bank/individual/failed/wamu.html>,  
 24 and the P & A Agreement is at [http://www.fdic.gov/about/freedom/Washington\\_Mutual\\_P\\_and\\_A.pdf](http://www.fdic.gov/about/freedom/Washington_Mutual_P_and_A.pdf).” Tubin v. Washington Mut. Sav.  
 25 Bank, 2011 WL 5834302 \*1, fn. 2.

26 A Notice of Breach and Default and of Election to Cause Sale of Real Property Under  
 27 Deed of Trust was recorded on October 12, 2010 in the Storey County Recorder’s Office attached  
 28 to the RJD as Exhibit 2.

1           A Substitution of Trustee was recorded on December 6, 2010 in the Storey County  
 2 Recorder's Office. It is attached to the RJD as Exhibit 3. The substitution substituted TRUSTEE  
 3 CORPS as foreclosure trustee.

4           A Corporate Assignment of Deed of Trust ("Assignment") was recorded on September 9,  
 5 2013 in the Storey County Recorder's Office attached to the RJD as Exhibit 4. The Assignment  
 6 assigns the DOT to Chase from the Federal Deposit Insurance Corporation, as Receiver of  
 7 Washington Mutual Bank F/K/A Washington Mutual Bank, FA. The Assignment is intended to  
 8 memorialize the transfer that occurred by operation of law on September 25, 2008 as authorized  
 9 by Section 11(d)(2)(G)(i)(II) of the Federal Deposit Insurance Act, 12 U.S.C.  
 10 §1821(d)(2)(G)(j)(II).

11           A Substitution of Trustee ("Substitution") was recorded on December 5, 2013 in the  
 12 Storey County Recorder's Office attached to the RJD as Exhibit 5. The Substitution substituted  
 13 TRUSTEE CORPS as foreclosure trustee.

14           A Notice of Breach and Default and of Election to Cause Sale of Real Property Under  
 15 Deed of Trust ("NOD") was recorded April 3, 2014, and is attached to the RJD as Exhibit 6.

### 16           III. **LEGAL ARGUMENTS**

#### 17           A. **LEGAL STANDARDS APPLICABLE TO MOTIONS TO DISMISS**

##### 18           1. **General Pleading Requirements**

19           A motion to dismiss is proper under Fed.R.Civ.P.Rule 12(b)(6) where the pleadings fail to  
 20 state a claim upon which relief can be granted. Rule 12(b)(6) allows a defendant "to test whether,  
 21 as a matter of law, the plaintiff is entitled to legal relief even if everything in the alleged  
 22 complaint is true." Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993).

23           In ruling on a Rule 12(b)(6) motion, the complaint is construed in the light most favorable  
 24 to the non-moving party, and all material allegations in the complaint are taken to be true.

25           Sanders v. Kennedy, 794 F.2d 478, 481 (9th Cir. 1986). The court, however, is not required to  
 26 accept legal conclusions cast in the form of factual allegations if those conclusions cannot  
 27 reasonably be drawn from the facts alleged. Clegg v. Cult Awareness Network, 18 F.3d 752,  
 28 754-755 (9th Cir. 1994).

1 Dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is  
 2 proper only if the pleadings fail to allege enough facts so as to demonstrate a ‘plausible  
 3 entitlement to relief.’ Bell Atlantic v. Twombly, 550 U.S. 544, 553-558 (2007). While a  
 4 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual  
 5 allegations, a Plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief”  
 6 requires more than labels and conclusions; a formulaic recitation of the elements of a cause of  
 7 action will not do. Factual allegations must be enough to raise a right to relief above the  
 8 speculative level on the assumption that all the allegations in the complaint are true (even if  
 9 doubtful in fact). Id. Only a complaint that states a plausible claim for relief survives a motion to  
 10 dismiss. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2008) *citing Bell Atlantic v. Twombly*, 550 U.S.  
 11 544, 556 (2007).

12 **2. Pleading Requirements for Fraud**

13 Federal Rule of Civil Procedure 8(a) generally provides that a pleading that sets forth a  
 14 claim must contain “a short and plain statement of the claim showing the pleader is entitled to  
 15 relief.” However, Federal Rule of Civil Procedure 9(b) requires all allegations of fraud to be  
 16 stated “with particularity.”

17 To satisfy the additional burdens imposed by Rule 9(b), the plaintiff must allege “the time,  
 18 place and nature of the alleged fraudulent activities.” Fecht v. Price Co., 70 F.3d 1078, 1082 (9th  
 19 Cir. 1995). In addition, Rule 9(b) “does not allow a complaint to merely lump multiple  
 20 defendants together but require[s] plaintiffs to differentiate their allegations when suing more  
 21 than one defendant ... and inform each defendant separately of the allegations surrounding her  
 22 alleged participation in the fraud.” Swartz v. KPMG LLP, 476 F.3d 756, 764-765 (9th Cir. 2007)  
 23 (quotation omitted). “In the context of a fraud suit involving multiple defendants, a plaintiff  
 24 must, at a minimum, ‘identif[y] the role of [each] defendant[ ] in the alleged fraudulent scheme.’  
 25 “Id., at 765 (quoting Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989)).  
 26 *See also, Schreiber Dist. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9<sup>th</sup> Cir. 1986) (the  
 27 pleader must allege the “time, place, and specific content of the false representations as well as  
 28 the identities of the parties to the misrepresentation”).

The Complaint sounds in fraud. Plaintiff here has made no attempt to comply with the Rule 9 requirements in the Complaint as to TRUSTEE CORPS. Conclusory allegations of fraud are insufficient.

**3. Construction of Exhibits Referred to in a Complaint or Attached to a Rule 12(b)(6) Motion**

The Court accepts as true the allegations in the complaint and construes them in favor of the plaintiff. Intri-Plex Tech., Inc. v. Crest Group, Inc., 499 F.3d 1048, 1050, n. 2 (9th Cir. 2007). “The court need not accept as true, however, allegations that contradict facts that may be judicially noticed by the court, and may consider documents that are referred to in the complaint whose authenticity no party questions.” Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000) (citations omitted).

“[E]xhibits attached to the complaint, as well as matters of public record may be considered in determining whether dismissal was proper without converting the motion to one for summary judgment. Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995); Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986) [*overruled on another ground in Astoria Federal Sav. and Loan Ass’n v. Solimino*, 501 U.S. 104, 107 (1991)].” Carpenter v. FDIC (In re Carpenter), 205 B.R. 600, 604 (9th Cir. BAP 1997). *Copies of officially recorded documents in the office of the Storey County Recorder are attached as Exhibits to the Motion to Dismiss.*

**B. TRUSTEE CORPS HAS NO DUTIES OTHER THAN THOSE SPECIFICALLY STATED IN THE DEED OF TRUST AND IN NEVADA'S NON-JUDICIAL FORECLOSURE STATUTES**

Common law does not impose any additional obligations on the foreclosure trustee other than those *specifically* stated in the judicially noticed document above and the governing statutes. *See, Weingartner v. Chase Home Finance, LLC*, 702 F.Supp.2d 1276, 1290, 1291 (D.Nev.; 2010) (*quoting Pro Value Properties, Inc. v. Quality Loan Service Corp.*, 170 Cal.App.4th 579, 583, 88 Cal.Rptr.3d 381 (2009); and finding no general duty of care, but holding only duty as defined by Nevada foreclosure statutes); *Diediker v. Peelle Financial Corp.*, 60 Cal.App.4th 288, 295, 70 Cal.Rptr.2d 442 (1997). Thus, the scope and nature of the trustee's duties are *exclusively* defined

1 by the judicially noticed documents above and the governing statutes. Banc of America Leasing  
 2 & Capital, LLC v. 3 Arch Trustee Services, Inc., 180 Cal.App.4th 1090, 1097-1098, 1104, 103  
 3 Cal.Rptr.3d 397 (2009) (trustee's rights, powers, and duties regarding notice of default and sale  
 4 strictly defined and limited by statutory scheme; Legislature intended to protect trustees from  
 5 costly litigation, and trustee's statutory duties cannot be expanded by courts). *No other common*  
 6 *law duties exist.* Hendrickson v. Popular Mortgage Servicing, Inc., 2009 WL 1455491 at \*7  
 7 (N.D. Cal.); Gomez v. Countrywide Bank, FSB, 2009 WL 3617650 at \*8 (D.Nev.) (*accord*, citing  
 8 Hendrickson); Pro Value Properties, Inc. v. Quality Loan Service Corp., *supra*, 170 Cal.App.4th  
 9 at 583; I.E. Associates v. Safeco Title Ins. Co., 39 Cal.3d 281, 287-288, 702 P.2d 596 (1985). See  
 10 *also*, Diediker v. Peelle Financial Corp., *supra*, 60 Cal.App.4th at 295; Residential Capital LLC v.  
 11 Cal-Western Reconveyance Corp., 108 Cal.App.4th 807, 827-829, 134 Cal.Rptr.2d 162 (2003)  
 12 (no common law expansion of tort obligations).

13 Therefore, because TRUSTEE CORPS' foreclosure duties are defined and limited by  
 14 statute, in this case, N.R.S. §§ 107.080, *et seq.*, no claim against TRUSTEE CORPS arising from  
 15 its actions taken during the foreclosure process can be stated, as argued further below.

16 **C. THE FIRST CLAIM FOR WRONGFUL FORECLOSURE, VIOLATION OF**  
 17 **N.R.S. 107.087 FAILS AGAINST TRUSTEE CORPS**

18 This count for wrongful foreclosure is *premature* since all that has been recorded is the  
 19 NOD. No Notice of Sale has been recorded. No [wrongful] foreclosure has occurred.

20 **1. Plaintiff Cannot State A Claim For Common Law Wrongful Foreclosure**  
 21 **Against TRUSTEE CORPS**

22 “An action for the tort of wrongful foreclosure will lie if the trustor or mortgagor  
 23 can establish that at the time the power of sale was exercised or the foreclosure  
 24 occurred, no breach of condition or failure of performance existed on the  
 25 mortgagor's or trustor's part which would have authorized the foreclosure or  
 26 exercise of the power of sale...Therefore, the material issue of fact in a wrongful  
 27 foreclosure claim is whether the trustor was in default when the power of sale was  
 28 exercised.” Collins v. Union Fed.Sav. & Loan Ass'n, 662 P.2d 610, 623 (Nev.  
 1983)

TRUSTEE CORPS has *never* exercised the power of sale. The Plaintiffs are in default.  
 Consequently, Plaintiffs cannot assert a common law claim for wrongful foreclosure.

29 //

1                   2. **Plaintiff Cannot State A Claim For Statutory Wrongful Foreclosure Against**  
 2                   **TRUSTEE CORPS**

3                   “A sale made pursuant to this section must be declared void by any court of  
 4                   competent jurisdiction in the county where the sale took place if: The trustee or  
 5                   other person authorized to make the sale does not substantially comply with the  
 6                   provisions of this section or any applicable provision of NRS 107.086 and  
 7                   107.087.” N.R.S. §107.080 5(a)

8                   TRUSTEE CORPS has *never* exercised the power of sale.

9                   3. **There Is No Violation Of N.R.S. 107.087**

10                  “1. In addition to the requirements of NRS 107.080, if the sale of property is a  
 11                  residential foreclosure, a copy of the notice of default and election to sell and the  
 12                  notice of sale must:

13                  (a) Be posted in a conspicuous place on the property not later than:

14                  (1) For a notice of default and election to sell, 100 days before the date of sale;...”

15                  No notice of sale has been recorded. The NOD has no date of sale stated anywhere on the  
 16                  document (RJN, Ex. 6). There presently is no sale date. Plaintiff merely gives an estimation of  
 17                  the sale date. Nothing more is provided. That falls short of the statute. Even more telling,  
 18                  Plaintiffs have not pleaded how this alleged failing to post has caused them prejudice. Plaintiffs  
 19                  do not deny being mailed the NOD. Consequently, there is no violation of the statute.

20                  D. **THE SECOND CLAIM FOR VIOLATION OF N.R.S. 107.500 FAILS AGAINST**  
 21                  **TRUSTEE CORPS**

22                  1. **No Damage Claim Can Be Asserted Against Trustee Corps**

23                  Plaintiffs assert “defendants” were not provided with the requisite 30 day letter in  
 24                  violation of N.R.S. §107.500. Plaintiffs contend they have a statutory damage claim for damages  
 25                  against “defendants” for violation of this law (Complaint, ¶27, but that charge is unsupported by  
 26                  the law as to TRUSTEE CORPS. As Plaintiffs acknowledge N.R.S. §107.560 provides the  
 27                  mechanism for bringing a claim for violation of N.R.S. §107.500. N.R.S. §107.560 states in  
 28                  pertinent part:

29                  “1. If a trustee’s deed upon sale has not been recorded, a borrower may bring an  
 30                  action for injunctive relief to enjoin a material violation of NRS 107.400 to  
 31                  107.560, inclusive...”

32                  ///

1           2. After a trustee's deed upon sale has been recorded..., a borrower may bring a  
 2           civil action in the district court in the county in which the property is located to  
 3           recover his or her actual economic damages resulting from a material violation of  
 4           NRS 107.400 to 107.560, inclusive, by the mortgage servicer, mortgagee,  
 5           beneficiary of the deed of trust or an authorized agent of such a person,... If the  
 6           court finds that the material violation was intentional or reckless, or resulted from  
 7           willful misconduct by a mortgage servicer, mortgagee, beneficiary of the deed of  
 8           trust or an authorized agent of such a person, the court may award the borrower the  
 9           greater of treble actual damages or statutory damages of \$50,000...  
 10           6. A court may award a prevailing borrower costs and reasonable attorney's fees in  
 11           an action brought pursuant to this section..."

8           No foreclosure sale has taken place. Plaintiff's only possible remedy, if any, at this time  
 9           is an injunction. Therefore, Plaintiffs claim for statutory damages should be dismissed.

10           **2. There Was No Material Violation of N.R.S. 107.500 By Trustee Corps**

11           The 30 day letter referenced in the pleading was the responsibility of the mortgage  
 12           servicer, mortgagee or beneficiary of the deed of trust to mail to Plaintiffs. See, N.R.S.  
 13           107.500 1. TRUSTEE CORPS is a foreclosure trustee. Further, the violation could not have  
 14           been material because in the same complaint, Plaintiffs allege they have an active loan  
 15           modification pending (Complaint, ¶31). Thus, there is no harm to them if what they state is true.  
 16           The claim should be dismissed.

17           **3. Plaintiff's Claims For Attorneys' Fees Should Be Dismissed Against Trustee  
 18           Corps**

19           As discussed above, there was no material violation of N.R.S. 107.500 by Trustee Corps.  
 20           Further, Plaintiffs found it unnecessary to bring an application for an injunction with their  
 21           complaint. The claim for attorneys' fees should be dismissed.

22           **E. THE THIRD CLAIM FOR VIOLATION OF N.R.S. 107.510 FAILS AGAINST  
 23           TRUSTEE CORPS**

24           **1. No Damage Claim Can Be Asserted Against Trustee Corps**

25           Plaintiffs assert "defendants" engaged in "dual tracking" in violation of N.R.S. §107.510.  
 26           Plaintiffs contend they have a statutory damage claim for damages against "defendants" for  
 27           violation of this law (Complaint, ¶35), but that charge is unsupported by the law as to TRUSTEE  
 28           CORPS. As Plaintiffs acknowledge N.R.S. §107.560 provides the mechanism for bringing a

1 claim for violation of N.R.S. §107.510, and no foreclosure sale has occurred. Consequently, no  
 2 damage claim can be made, and the claims for damages should be dismissed. See, §107.560 1. &  
 3 2.

4 **2. There Was No Material Violation of N.R.S. 107.510 By Trustee Corps**

5 Plaintiffs believe they submitted an active loan modification application at the time the  
 6 NOD was recorded (Complaint, ¶31), and therefore, “defendants” violated N.R.S. 107.510 by  
 7 recording the NOD. They accuse the “defendants” of “dual tracking” (Id., ¶32) N.R.S. 107.510  
 8 states in pertinent part:

9 “1. A mortgage servicer, mortgagee, trustee, beneficiary of a deed of trust or an  
 10 authorized agent of such a person may not record a notice of default and election  
 11 to sell pursuant to subsection 2 of NRS 107.080 or commence a civil action for a  
 foreclosure sale pursuant to NRS 40.430 involving a failure to make a payment  
 required by a residential mortgage loan until:....

12 (c) The mortgage servicer, mortgagee or beneficiary of the deed of trust complies  
 13 with NRS 107.520 and 107.530, if the borrower submits an application for a  
 14 foreclosure prevention alternative offered by, or through, the mortgage servicer,  
 mortgagee or beneficiary.”

15 In the instant case, the mortgage servicer or trust deed beneficiary would have received  
 16 the loan modification application from Plaintiffs. The mortgage servicer or trust deed beneficiary  
 17 evaluates the loan modification application, makes the decision on same, addresses the appeal  
 18 issues and sends out the notices related to the loan modification application. *TRUSTEE CORPS*  
 19 *is not involved in any of this process.* It is a foreclosure trustee. Nothing is pleaded *factually* to  
 20 reflect TRUSTEE CORPS was involved in the loan modification process or what notices it  
 21 received from the servicer or trust deed beneficiary concerning the status of the loan modification  
 22 process.

23 Again, N.R.S. §107.560 states in pertinent part, “1. If a trustee's deed upon sale has not  
 24 been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation  
 25 of NRS 107.400 to 107.560, inclusive...” This code section is inapplicable to TRUSTEE CORPS  
 26 in this instance. The reason is no material violation is pleaded with respect to TRUSTEE  
 27 CORPS. The loan servicer or trust deed beneficiary directs or instructs the foreclosure trustee to  
 28 stop, start, resume, or complete the foreclosure process based on the loan servicer or trust deed

1 beneficiary's status or progress with respect to a loan modification application. TRUSTEE  
 2 CORPS has no duty to involve itself, evaluate, or second guess what the loan servicer or trust  
 3 deed beneficiary is doing with respect to loan modification process. It accepts instructions.

4 In this count and at the end of the count (Complaint, ¶34), Plaintiffs also assert a laundry  
 5 list of other violations of provisions N.R.S. 107.510 through N.R.S. 107.530. The charges are  
 6 conclusory and Plaintiffs fail to plead factually TRUSTEE CORPS' connection with or  
 7 implication in any the charges. Therefore and again, Plaintiffs do not plead any material violation  
 8 of these provisions triggering the remedies offered under N.R.S. §107.560. Consequently, the  
 9 third claim should be dismissed.

10 **3. Plaintiff's Claims For Attorneys' Fees Should Be Dismissed Against Trustee**  
 11 **Corps**

12 As discussed above, there was no material violation of N.R.S. 107.510 by Trustee Corps.  
 13 Further, Plaintiffs found it unnecessary to bring an application for an injunction with their  
 14 complaint. The claim for attorneys' fees should be dismissed.

15 **F. THE FOURTH CLAIM FOR FRAUD FAILS AGAINST TRUSTEE CORPS**

16 Federal Rules of Civil Procedure, Rule 9(b) requires all allegations of fraud to be stated  
 17 "with particularity."

18 "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of  
 19 the misconduct charged." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003).

20 Rule 9(b) also does not allow a complaint to lump multiple defendants together, but  
 21 instead, requires a plaintiff to differentiate their allegations when suing more than one defendant  
 22 and to inform *each* defendant *separately* of the allegations surrounding his alleged participation in  
 23 the fraud. *See, Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011).

24 "[A] plaintiff asserting fraud against a corporate [entity] must state the names of the  
 25 persons who made the allegedly fraudulent representations, their authority to speak, to whom they  
 26 spoke, what they said or wrote, and when it was said or written..." Mackovska v. Recontrust Co.,  
 27 N.A. 2013 WL 2152697 \*5 (D.Nev.).

28 Here, Plaintiffs have totally ignored the pleading burdens imposed by Rule 9(b) as to

1 TRUSTEE CORPS. Not a single element of a fraud count is pleaded separately and factually  
 2 against any person at Trustee Corps. Further, all of the allegations are conclusory and at best  
 3 pleaded against "Defendants" without factually distinguishing any defendant in Plaintiff's general  
 4 and non-specific allegations of fraud. For instance, the count asserts false statements were made  
 5 in the Affidavit of Authority attached to the NOD about Chase in particular. But, there are no  
 6 specific facts pleaded to show the statements were false and TRUSTEE CORPS knowing  
 7 participation in the fraud. Thus, the count should be dismissed.

8

**IV. CONCLUSION**

9 In order to survive a motion to dismiss for failure to state a claim, a complaint must set  
 10 forth enough facts to state a claim for relief that is plausible on its face. A Court need not permit  
 11 an attempt to amend a complaint if, as here, it determines that the pleading could not possibly be  
 12 cured by allegations of other facts. Albrecht v. Lund, 845 F.2d 193, 195-196 (9th Cir. 1988) (no  
 13 liability as a matter of law); Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990)  
 14 (amendment futile). Accordingly, the Complaint as to TRUSTEE CORPS should be dismissed  
 15 *without leave to amend*.

16 Dated: July 16, 2014

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## **CERTIFICATE OF SERVICE**

Pursuant to L.R., Part II, 5-4, I certify that I am an employee of BURKE, WILLIAMS & SORENSEN, LLP, and that on July 16, 2014, I caused to be served a true copy of the **DEFENDANT MTC FINANCIAL INC. dba TRUSTEE CORPS' MOTION TO DISMISS WITH PREJUDICE THE PLAINTIFF'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** addressed to all parties and counsel as identified on the Court-generated Notice of Electronic Filing; all counsel being registered to receive CM/ECF Electronic Filing as follows:

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